



**PUBLIC HEARING
BEFORE THE BRIDGER CANYON
PLANNING AND ZONING COMMISSION**

**BRIDGER CANYON PROPERTY
OWNERS ASSOCIATION APPEAL OF
OCTOBER 1, 2008 COMPLIANCE
DECISION ON THEISEN GARAGE**

**FINDINGS, CONCLUSIONS AND
ORDER**

SUMMARY OF PROCEEDINGS

This matter comes before the Bridger Canyon Planning and Zoning Commission (Planning and Zoning Commission) on December 11, 2008 as an appeal from the October 1, 2008 decision of the Gallatin County Code Compliance Specialist that 1) there does not appear to be reasonable cause to revoke the Theisen's land use permit (L08-103) now for an Accessory Structure (Garage) at 7850 Bridger Canyon Road, Bozeman, MT in the Bridger Canyon Zoning District, and 2) the Theisen garage was built in compliance with the terms of their approved land use permit.

Pursuant to Section 17.5 of the Bridger Canyon Zoning Regulations, the purpose of this appeal hearing was to review the October 1, 2008 decision by the Gallatin County Code Compliance Specialist and to affirm, modify, or reverse the decision.

Pursuant to the Bridger Canyon Zoning Regulations, which were adopted on October 26, 1971 and subsequently amended, and after legal notice, a public hearing was held before the Planning and Zoning Commission in Bozeman, MT on December 11, 2008. Notice of the public hearing was published in the Bozeman Daily Chronicle on November 23 and 30, 2008, and sent to adjacent property owners via certified mail.

APPLICABLE REGULATIONS

1. The Bridger Canyon Zoning Regulations and map were adopted by the Gallatin County Commission on October 26, 2008 and subsequently amended.
2. Section 6.2 of the Bridger Canyon Zoning Regulations defines uses allowed by right in the AE District to include barns, corrals, and other out buildings and structures accessory to a residential dwelling and/or agricultural operations, including the cultivation of ground and raising of livestock.
3. Section 6.5(b) requires a 125 foot setback from the right-of-way from Bridger Canyon Road.
4. Section 14 of the Bridger Canyon Zoning Regulations addresses nonconforming rights, including structures built prior to adoption of the zoning regulations that could not otherwise be built. Such structures are allowed to continue, provided they remain otherwise lawful. Portions of Section 14.4 relevant to the Theisen property, and this decision include:
 - a. No structure may be enlarged or altered in a way that increases its non-conformity.
 - b. Should such structures be destroyed by any means, in extent of more than 75% of its replacement cost at the time of destruction it shall not be reconstructed except in conformity with the provisions of this Regulation.
 - e. Building existing on the effective date of this Regulation which is non-conforming only as to setback from a public road may be expanded in any direction except closer to said public road.
5. Section 17.2.3 of the Bridger Canyon Zoning Regulations states, “For buildings which clearly comply with all of these regulations building permits may be issued by the Zoning Enforcement Agent in the name of the Planning and Zoning Commission.”
6. Section 17.4(c) of the Bridger Canyon Zoning Regulations provides that with reasonable cause, the Planning and/or Compliance Departments may revoke any land use permit.
7. Section 17.5 of the Bridger Canyon Zoning Regulations provides that appeals from the decision of the Zoning Enforcement Agent concerning interpretation of this Regulation may be taken in writing to the Planning and Zoning Commission.

TESTIMONY

8. Deborah Stratford, on behalf of the Bridger Canyon Property Owners Association (BCPOA) testified that the October 1, 2008 decision of the Code Compliance Specialist should be reversed for the following reasons:
 - A. The land use permit (LUP) L08-103 issued to the Theisens to retain/rebuild the garage was issued in error, the LUP does not comply with Section 14.4(b) of the Bridger Canyon Zoning Regulations, and should be declared null and void.
 - B. Construction of the Theisen garage does not comply with the approved LUP L08-103 because the three walls were replaced with new construction. Retention of a few studs does not constitute retention of walls. Ms. Stratford submitted photos of the structure taken by the Code Compliance Specialist. **Exhibit L.**
 - C. If the Code Compliance Specialist's decision is affirmed, then the nonconforming right regulations in the Bridger Canyon Zoning Regulations are essentially invalidated.
 - F. Errors can be made, but there must be a methodology in place to correct those errors. Residents of the Zoning District must be able to rely on government officials upholding the integrity of the regulations. The applicant could have requested a variance.
 - G. The LUP was not clearly compliant, and pursuant to Section 17.2.3, should have been referred to the Planning and Zoning Commission for a determination.
9. Ms. Stratford entered Brian Gallik's December 11, 2008 letter into the record. **Exhibit M.** Mr. Gallik asserts that the LUP issued to the Theisens for the garage should be declared null and void, that the Commission should revoke the permit, and order the garage removed.
10. Joseph (Joby) Sabol II, on behalf of Mark and Addie Theisen testified that the October 1, 2008 decision of the Code Compliance Specialist should be affirmed for the following reasons:
 - A. The Gallatin County Planning Department advised the Theisens that if they wanted to retain the garage, they could submit a LUP and demonstrate compliance with the zoning regulations.

- B. The Theisens relied on the land use permit approved by the Planning Department and built their structure in accordance with the approved permit. They made every effort to comply, and there was no impropriety or misrepresentation on their part. The studs were connected at all times and have structural value. You can rely on the Code Compliance Specialist's assertion that verbal and written descriptions of constructions methods employed on site track with her on site observations. The Theisens have a right to rely on the permit, they spent a lot of money, and changed their position in what the law would call justifiable reliance on the issuance of a valid permit.
 - C. Mr. Sabol stated that the process has not been fair, and he believes that the Theisens are being singled out and targeted by the BCPOA. He sent a letter to the County Commission, County Attorney's Office, and the BCPOA on July 1, 2008 regarding this issue. There are many other noncompliant structures in Bridger Canyon, including the Bridger Canyon Fire Station and their sign. **Exhibit N.**
11. Andrew Daigle (Locati Architects) testified in support of a decision to affirm the Code Compliance Specialist:
- A. That he sought additional clarification on the Bridger Canyon Zoning Regulations and went to the "Nth" degree to comply with them. Construction started on June 3, 2008, only after he received clarification from the Planning Department on what they needed to do to comply with the nonconforming regulations.
 - B. They were three weeks into construction, the walls were up and the roof was on, before the complaints were filed. SBC Construction was on site every day, and he provided clear guidance to them on what needed to remain from the original structure.
12. Jamie Bottcher, principal owner and project manager for SBC Construction (Schlaugh Bottcher Construction), testified that they built the structure in accordance with the approved land use permit. The foundation, three walls, and mud sill stayed intact throughout the process. The existing studs provide structural integrity and act to connect the new construction to the existing construction. From his experience, Mr. Bottcher believes the construction falls within the 75% value.

13. Charles Immemschuh (the Theisen's property caretaker) read a letter into the record from Ralph Ferraro, an adjacent landowner to the Theisens. In this letter, Mr. Ferraro states he believes the new structure blends in better with the surrounding environment more than the old red house ever did, and he feels that the new structure is an asset and benefit, and not a detriment or distraction to the canyon. **Exhibit O.**
14. Eric Kellogg, the project supervisor with SBC Construction, testified that he was on site every day during construction supervising the project, that the mud sills and studs were left intact, and that they did not build pony walls on top of existing walls. The new framing was directly attached to the old studs to get to the proper height. Everything was built according to the approved plans. Mr. Kellogg submitted photos of the interior of the structure. **Exhibit O.**
15. Anne Trygstad, a Bridger Canyon resident at 7890 Bridger Canyon Drive, testified that she walks and drives by the Theisen property many times a day and takes an issue with the statement that the three walls were left standing because she distinctly remembers no walls and freshly poured concrete.
16. In appellant rebuttal, Deb Stratford, representing BCPOA, testified:
 - A. That BCPOA has not filed a complaint over the Bridger Canyon Fire Station and sign because they were unaware that the fire station was an illegal structure, and also they thought public entities and may be outside the purview of the zoning regulations.
 - B. The BCPOA is not picking on the Theisens. However, their property borders a main arterial road (Bridger Canyon) and is visible in a scenic corridor. People are more aware of what is happening on that property.
 - C. The LUP was issued erroneously. The structure is lovely, but did not retain three walls, and does not meet the requirements of Section 14.4(b).

FINDINGS OF FACT

17. The Theisen property is located at 7850 Bridger Canyon Road, Bozeman, Montana. The property is located on Tract A of COS 2174A, in the E ½, NW ¼, Section 31, Township 1 South, Range 7 East, Gallatin County, Montana.

18. The Theisen property is located in AE-PD-20 District of the Bridger Canyon Zoning District.
19. On July 31, 2007, the Planning Department approved Theisen's Land Use Permit (L08-005) for a new residence at 7850 Bridger Canyon Road with a condition that the "existing residence shall be torn down within six months of the completion of construction on the new residence." At that time the Planning Department also advised the Theisens that "Should you desire to keep any part of the existing residence intact, such as the garage, a land use permit for that structure must be obtained. That structure will be subject to all standards as defined by the Bridger Canyon Zoning Regulation. Any non-conforming status the original residence had is voided with the issuance of this permit."
20. On December 5, 2007, Andrew Daigle, Locati Architects submitted a cover letter with the Theisen's LUP application for the Accessory Structure (Garage). In this letter he states, "It is the property owner's intent to rebuild a portion of an existing non-conforming structure as an accessory building. This building is to be used in the daily agricultural operations as a repair shop and storage of agricultural equipment."
21. On December 10, 2007, the Planning Department approved Theisen's Land Use Permit (**L08-103**) for an Accessory Building (Garage) at 7850 Bridger Canyon Road. This LUP allowed the Theisen's to retain the same 500 sq. ft. footprint as the original garage and also allowed them to make the structure taller. In accordance with the condition placed on L08-005, the residential portion of the nonconforming structure was to be torn down.
22. L08-103 authorized a 500 sq. ft. structure that is 12'-8" tall with a 6:12 roof pitch, and sided with natural wood horizontal lap siding and cedar shingles.
23. The Theisen garage is located entirely within the 125-foot setback to Bridger Canyon Road, and is nonconforming with regards to setback. Pursuant to Section 14.4 (a) and (e), it is permissible to alter/expand the nonconforming structure as long as the structure is not moved closer to Bridger Canyon.
24. L08-103 complies with Section 14.4 (a) and (e) because the structure was built up and not closer to Bridger Canyon Road. The nonconformity was not increased.
25. When the Planning Department approved L08-103, they relied on the Theisen's representation of how the proposed construction complied with Section 14.4(b), as described in the December 5, 2007 letter from Andrew Daigle, Locati Architects.

26. BCPOA voiced their concerns about the Theisen garage permit to Planning staff on March 12, 2008 and March 25, 2008. Based upon advice received from the County Attorney's office in April 2008, the Planning Department did not revoke the Theisen's LUP, and it remains valid.
27. On June 24, 2008, BCPOA filed a formal complaint about the Theisen garage with the Code Compliance Specialist.
28. On June 24, 2008 and July 24, 2008, the Code Compliance Specialist inspected the Theisen garage. Construction was well underway at the time of the first inspection, and the structure was largely complete at the second inspection.
29. On October 1, 2008, the Code Compliance Specialist determined:
 - A. There does not appear to be reasonable cause to revoke the Theisen's land use permit for the garage now.
 - B. The garage was built in compliance with the terms of the approved LUP (#L08-103) and additional guidance provided by the Planning Department.

CONCLUSIONS

30. After considering public testimony and in board discussion, the Bridger Canyon Planning and Zoning Commission concludes:
 - A. The Planning Department approved a land use permit for a design that was submitted. The Code Compliance Specialist investigated the structure and determined that the construction was supported by the approved design.
 - B. The architect and construction supervisor testified that they built the structure in accordance with the approved land use permit.
 - C. The Code Compliance Specialist's October 1, 2008 determination is a reasonable interpretation of the Bridger Canyon Zoning Regulations, and the Planning and Zoning Commission will support and stand by that decision.
 - B. Ample time was given to the Planning and Zoning Commission to read the arguments submitted by Brian Gallik (Goetz, Gallik & Baldwin, P.C.) to reverse the decision.

- E. The accessory structure was replaced by a similar sized structure and meets the Bridger Canyon Zoning Regulations.
- H. To adopt and incorporate the findings contained in the Code Compliance Specialist's staff report into this Findings, Conclusion and Order.
- I. Pursuant to Section 17.4(c) of the Bridger Canyon Zoning Regulations, the Code Compliance Specialist must have reasonable cause to revoke the Theisen's LUP. The Code Compliance Specialist did not have reasonable cause to revoke LUP for the following reasons:
 - 1. On July 31, 2007, LUP L08-005 was granted by the Planning Department allowing the Theisens to replace the primary residence located at 7850 Bridger Canyon Road conditioned upon the existing residence being torn down within six months of the completion of the new residence.
 - 2. On July 31, 2007, the Planning Department advised the Theisens that they could apply for a land use permit if they desired to keep any part of the existing residence intact (i.e. the garage), and that the structure would be subject to all standards as defined by the Bridger Canyon Zoning Regulation. Planning also stated that any non-conforming status the original residence had is voided with the issuance of this permit.
 - 3. On December 10, 2007, LUP L08-103 was granted by the Planning Department allowing the Theisens to retain/rebuild the garage portion of the existing nonconforming residence as an accessory structure.
 - 4. The work completed on the Accessory Structure (Garage) complies with LUP L08-103 as granted and additional guidance provided by Gallatin County.
 - 5. The Accessory Structure (Garage) is a use allowed by right in the AE District.
 - 6. The structure is located approximately 85 feet from Bridger Canyon Road, and does not present an imminent risk to public health and safety.
 - 7. At the time the complaint was formally filed, the Theisens had already begun construction of the accessory structure, and they should be allowed to rely on prior decisions and actions of Gallatin County.

- J. The Theisen garage was retained/rebuilt in compliance with the authorized land use permit (L08-103), and additional guidance provided by the Planning Department.
1. L08-103 authorized a 500 sq. ft. structure taller than the original structure with a new roof design. Elevation drawings included with the LUP provide an accurate representation of what was constructed at the site.
 2. The increased height/volume of the garage is permissible under Sections 14.4(a) and (e) of the Bridger Canyon Zoning Regulations.
 3. The Theisens (Locati Architects) requested additional guidance from Gallatin County pertaining to compliance with Section 14 of the Bridger Canyon Zoning Regulations prior to construction. Gallatin County informed the Theisens that removing the roof and all the garage walls will destroy the non-conforming building in excess of 75% of the cost to rebuild, and additionally that removal of the foundation will destroy more than 25% of the structure, both of which would require the structure to be rebuilt in compliance with the Bridger Canyon Zoning Regulations.
 4. The Theisens capped the old foundation with a new slab, and removed two exterior layers of siding, which left only the studs on three of the walls. (The fourth wall was destroyed during demolition of the attached nonconforming residence as conditioned by LUP L08-005.) No sheathing (plywood) was used in the construction of the original structure.
 5. Retaining studs from three of the walls and capping, but not removing the original foundation complied with guidance given by Gallatin County.
- K. A motion was made by Commissioner Horn, and seconded by Commissioner Skinner to affirm the October 1, 2008 decision by the Code Compliance Specialist. The motion passed unanimously (4:0).

DETERMINATION AND ORDER

The Bridger Canyon Planning and Zoning Commission having made and adopted the above findings of fact and conclusions as a part of this determination, and after due deliberation and

consideration of all the facts, circumstances, rules, laws and regulations, and after carefully considering the testimony, documents, exhibits, and submissions in this case enters a determination that the October 1, 2008 decision by the Gallatin County Code Compliance Specialist is hereby AFFIRMED.

Bridger Canyon Planning and Zoning Commission

R. Stephen White, Chairman

Date

Joe P. Skinner, Member

Date

Kimberly Buchanan, Member

Date

Beth Horn, Member

Date

Excused

William A. Murdoch, Member

Date

Excused

Charlotte Mills, Member

Date

Excused

Anne Trygstad, Member

Date